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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1526

ABEX CORPORATION, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-10a) is reported at 420 F.2d 928. Neither the initial decision of the hearing examiner (Pet. App. 58a-128a) nor the final order and opinion of the Federal Trade Commission (Pet. App. 12a-57a) is officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on January 8, 1970 (Pet. App. 1a), and a petition

for rehearing was denied on February 3, 1970 (Pet. App. 11a). The petition for a writ of certiorari was filed on May 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Federal Trade Commission, upon ordering divestiture of a corporation acquired in violation of Section 7 of the Clayton Act, may additionally prohibit any future acquisition of firms engaged in the same line of commerce for a specified period.

2. Whether the Commission applied proper standards in upholding factual determinations of its hearing examiner regarding the scope of the relevant product market.

## STATUTES INVOLVED

Pertinent provisions of the Clayton Act (38 Stat. 730, as amended, 15 U.S.C. 12-27) are set forth in the petition (Pet. 3).

## STATEMENT

On April 16, 1963, the nation's largest manufacturer of sintered metal friction materials, S. K. Wellman Company ("Wellman"), merged with the American Brake Shoe Company ("Brake Shoe")[1]

[1] The American Brake Shoe Company adopted its present name, Abex Corporation, on April 26, 1966, after these proceedings had been initiated. It has since become a wholly owned subsidiary of Illinois Central Industries, Inc. (see Pet. 4, n. 1).

(Pet. App. 2a-3a, 9a). Sintered friction materials are powdered metals pressed together with friction modifiers for use in brakes and clutches (Pet. App. 83a, 91a-92a). In addition to railroad products, hydraulic products, castings, and organic friction materials, Brake Shoe was then the country's third largest producer of sintered metal friction materials (Pet. App. 2a-3a). As a result of the acquisition, more than 60 percent of the market for this latter product is now controlled by the combined firm (Pet. App. 9a). In proceedings under Section 11 of the Clayton Act before the Federal Trade Commission challenging the merger, the hearing examiner found it violated Section 7 of the Act in two product markets—general friction materials and sintered metal friction materials. He ordered Brake Shoe to divest itself of Wellman and prohibited for a period of ten years its acquisition of any firms engaged "in the production or sale of friction material" (Pet. App. 127a).

On Brake Shoe's appeal to the full Commission, it modified the initial decision to encompass only the sintered metal friction materials market and, correspondingly, limited the ten-year restriction against future acquisitions to that line of commerce (Pet. App. 17a-18a). Brake Shoe had challenged the hearing examiner's market findings primarily on the ground that they "ignored evidence demonstrating the 'pervasive interchangeability' between sintered metal and other friction materials on the one hand, and between all friction materials and functionally

equivalent devices on the other" (Pet. App. 20a). In the course of reviewing the market evidence, including Brake Shoe's and Wellman's sales brochures and catalogs plus Brake Shoe's 1961 annual report, the Commission stated (Pet. App. 23a):

> The consistent promotional claims of Brake Shoe and Wellman support the conclusion that sintered metal friction materials have commercially significant performance characteristics, including longer life and heat resistance, distinguishing them from other friction materials. The question remains whether the testimony and other evidence adduced in this proceeding vitiates the finding on this point which Brake Shoe's and Wellman's promotional claims considered alone would justify.

The Commission then reviewed Brake Shoe's evidence of "pervasive interchangeability" and concluded that the "testimony, taken as a whole * * * does not negate the finding compelled by the promotional claims of Brake Shoe, Wellman and Raybestos that sintered metals have unique characteristics distinguishing them in a commercially significant way from other friction products; rather, it tends to support that finding" (Pet. App. 25a; see *id.* at 25a-32a). Moreover, the Commission referred at length to evidence of expanding sales of sintered metal materials despite a price higher than other friction products (Pet. App. 32a-33a), and to testimony indicating that the former product involved a more sophisticated technology than its alleged actual or potential competition (*id.* at 33a-37a).

On review, the court of appeals rejected, *inter alia*, Brake Shoe's contention that the Commission's market findings could not be supported by the evidence, as well as its challenge to the Commission's authority to prohibit for a specified period future acquisitions in the line of commerce in which the violation occurred (Pet. App. 2a-10a). However, because the record concerned only manufacturing entities, the court deleted from the Commission's order its restriction against acquisitions of firms which sell, but do not make, sintered metal friction materials.

## ARGUMENT

The decision below is correct and the issues presented by the instant petition do not warrant further review.

1. Section 11 of the Clayton Act provides that upon finding a violation, the Commission shall issue an order requiring the violator "to cease and desist from such violations, and divest itself of the stock * * * or assets, held * * * contrary to the provisions of Section 7 * * * of this Act * * *." Petitioner contends that this language is not sufficiently broad to encompass authority to issue a prohibition for a specified period against future acquisitions in the same line of commerce in which a violation has occurred. We submit that the court of appeals correctly rejected this contention in the light of modern precedents.

In Section 11, Congress conferred on the Commission ample ancillary powers "essential to the effective

discharge of the Commission's responsibilities." *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 607. Such powers need not be detailed in the statute (*id.* at 606, n. 4). Indeed, this Court has held that it may not, "in the absence of compelling evidence that such was Congress' intention * * *, prohibit administrative action imperative for the achievement of the agency's ultimate purposes." *Permian Basin Area Rate Cases*, 390 U.S. 747, 780; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177. Other cases under Section 11 of the Clayton Act, and under the similarly worded Section 5 of the Federal Trade Commission Act, confirm that the Commission's remedial powers are not limited to correction of the specific violation found. See, *e.g.*, *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 363-364 (Section 2(c) of the Clayton Act); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-430 (Section 5 of the Federal Trade Commission Act); and *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (Section 2(a) of the Clayton Act). Rather, within the limits of responsible discretion, its remedial authority may be exercised to forestall in their incipiency any threats of renewed violations. See, *e.g.*, *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 376; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-395; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612-613. Thus, in *Henry Broch & Co.*, *supra*, this Court *reversed* a court of appeals decision that excised language prohibiting future transactions involving parties other

than those included in the illegal transaction found. The scope of the Commission's order here is well within the ambit of these authorities. Its action is fully justified in light of the market's high degree of concentration and petitioner's history of expansion through acquisition (see J.A. 240, 452-453; 2652-2653, 2810, 2812, 2847-2849).[2]

The precedents of an earlier day upon which petitioner relies, *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554, and *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission*, 291 U.S. 587, are no longer controlling. Those cases held that the Commission could not order divestiture of assets unless acquired subsequent to a stock divestiture order. However, it was the very purpose of the 1950 amendments to the Clayton Act (64 Stat. 1125) to fill the enforcement vacuum left by these decisions, and to sanction the arresting of incipient threats to competition through corporate concentration. Compare *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 324-349, with *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 313-314, nn. 22-24. Petitioner's contentions that *Arrow-Hart* was invalidated only to the extent that the Commission may now "order divestiture of assets as well as stock" and that the 1950 amendments confer no broader power (Pet. 11, n. 8) ignore the significance of this Court's more recent decisions dealing with the Commission's

[2] "J.A." refers to the joint appendix filed in the court of appeals.

remedial powers. Indeed, in *Dean Foods Co., supra*, this Court expressly rejected an earlier decision, *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, which had been based on the restrictive approach of *Western Meat Co., supra*. In light of the 1950 amendments to the Clayton Act and the rationale of *Dean Foods*, it is now clear that *Western Meat* and *Arrow-Hart* are no longer controlling and that the Commission's remedial powers under Section 11 "are broadly equitable" in character. *Ekco Products Company* (1963-1965 F.T.C. Transfer Binder) Trade Reg. Rep. ¶ 16,879 at 21,903-21,906, affirmed, 347 F.2d 745 (C.A. 7); cf. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 312-313, nn. 17-18; *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 129-131; *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (C.A. 6).

2. Having failed to persuade the court of appeals that the evidence supporting the submarket finding was insufficient, petitioner for the first time attempts to fashion a procedural due process argument out of the Commission's reliance on promotional materials (Pet. 9-10, 14-18). Its reliance upon *Cinderella Career and Finishing Schools, Inc., et al.* v. *Federal Trade Commission*, No. 22,624 (C.A.D.C.), decided March 20, 1970, is misplaced. There the court of appeals held only that because the advertisements involved did not on their face disclose their capacity to deceive, the Commission could not disregard the examiner's findings and extensive relevant testimony in

concluding that they were deceptive (*Cinderella Finishing Schools, supra,* slip op. at 10-11).

Indeed, only three pages of the Commission's opinion here discuss the promotional materials, while most of the remainder of the opinion is devoted to other supporting evidence on the submarket issue (see Pet. App. 21a-23a; 23a-56a). The extensive expert testimony and economic evidence considered amply support the Commission's conclusion that "sintered metal friction materials possess unique performance characteristics differentiating them from other friction materials" (Pet. App. 21a).

Here the Commission, in sustaining—not overruling—the hearing examiner, concluded that the sintered metal friction materials market could be supported by promotional claims alone. But, contrary to petitioner's assertion, it did not rely solely on that evidence. Rather, it proceeded to review extensively the remaining evidence of record on the point (Pet. App. 24a-41a.) Moreover, there is nothing inherently improper in reliance by the Commission upon promotional claims as a factor in the market determination. Both *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 381, n. 7, and *General Foods Corp.* v. *Federal Trade Commission*, 386 F.2d 936, 942 (C.A. 3), cited by petitioner to disparage such evidence, involve rejection by reviewing courts of attempts to overcome adverse findings of fact solely upon mass market advertising claims. In contrast, the promotional claims in this case were directed towards highly sophisticated industrial buyers and knowledgeable businessmen (see, *e.g.*, Pet. 5-6; J.A. 382-383, 388-389,

1503-1511, 1632, 1691-1701, 1980-1983). In the light of its experience and expertise, the Commission was entitled to give weight to this evidence. The record in this case, which encompasses 4811 pages, includes the testimony of 61 witnesses and 165 exhibits received on behalf of petitioner (Pet. App. 61a), and has been fully and carefully considered three times. There is no need for further review.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted.

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